

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ESTATE OF SIDNEY ROEMER AND SADIE ROEMER</b>	:	DETERMINATION
	:	DTA NO. 815734
for Redetermination of a Deficiency or for Refund of New	:	
York State and New York City Personal Income Taxes	:	
under Article 22 of the Tax Law and the Administrative	:	
Code of the City of New York for the Year 1988.	:	

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Petitioners, Estate of Sidney Roemer and Sadie Roemer, 3800 South Ocean Drive, Apt. 1816, Hollywood, Florida 33019-2923, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 1988.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on December 16, 1997 at 10:00 A.M., with all briefs to be submitted by March 16, 1998, which date began the six-month period for the issuance of this determination. Petitioners appeared by Melvin M. Bark, CPA. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Gary Palmer, Esq., of counsel).

***ISSUES***

I. Whether it was proper for the Division of Taxation to have issued a Notice of Deficiency to petitioner Sadie Roemer.

II. Whether certain wage income earned by Sidney Roemer in 1988 was properly determined to be subject to New York State and New York City personal income taxes.

III. Whether interest imposed upon deficiencies of New York State and City personal income taxes should be abated.

### ***FINDINGS OF FACT***

1. On October 25, 1995, the Division of Taxation (“Division”) issued a Statement of Personal Income Tax Audit Changes to the Estate of Sidney Roemer and Sadie Roemer asserting additional New York State personal income tax due in the amount of \$12,891.06, plus penalty and interest, and additional New York City personal income tax due in the amount of \$847.90, plus penalty and interest, for the year 1988. An explanation of the tax deficiencies stated as follows:

It has been determined based on all available information in your file that you have income subject to NYS Income tax and you are therefore required to file a NYS Income Tax return. Since you have not shown that wages from Cullman Ventures were not associated with NYS sources, the wages are taxable. Also, if as you indicate the wages were for consulting or directors fees, they are taxable for days worked in New York. Finally, if the wages were earned while working at home, the wages are subject to New York Income Tax.

2. On November 24, 1995, the Division issued a Notice of Deficiency to Sadie Roemer and Sidney Roemer<sup>1</sup> asserting additional tax due in the amount of \$13,738.96 (\$12,891.06 State tax and \$847.90 City tax), plus penalty and interest, for a total amount due of \$31,887.61 for the year 1988.

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<sup>1</sup>Sidney Roemer died on March 2, 1991. Petitioners’ representative, Melvin M. Bark, CPA, obtained individual powers of attorney from Sadie Roemer and from the Estate of Sidney Roemer (Sandra Dorfman, Executrix). Since the income at issue was earned by Sidney Roemer and, since the Division issued the Notice of Deficiency to Sadie Roemer solely for the reason that petitioners filed a joint Federal return for 1988, all references to “petitioner” shall refer to Sidney Roemer.

3. On December 20, 1996, the Division's Bureau of Conciliation and Mediation Services issued a Conciliation Order (CMS No. 153386) which sustained the tax deficiency of \$13,738.96, but canceled penalty and imposed interest at the applicable rate.

4. For the year 1987, the year prior to the tax year at issue, petitioners filed a joint Federal income tax return and a joint resident State and City personal income tax return (form IT-201). On the form IT-201, petitioners indicated that they were residents of New York State for 10 months. Attached to the return was a form IT-360, Change of Resident Status, on which they indicated that they were residents of New York for the period January 1 through October 31, 1987.

5. For the year 1988, petitioners filed a joint Federal income tax return; however, they did not file a New York State or City return for the year. In December 1992, the Division commenced an audit of petitioners as a result of their failure to file a New York State and City return for 1988.

6. For the year 1987, Pharmacists Public Relations Bureau ("PPRB"), a Division of Cullman Ventures, Inc., issued a form W-2, Wage and Tax Statement, which indicated that petitioner earned wages or other compensation in the amount of \$191,239.62. Despite having filed a form IT-360, Change of Resident Status, petitioner allocated all of his wages received from PPRB to New York. For the year 1988, Cullman issued a form W-2 to petitioner indicating wages or other compensation earned in the amount of \$188,423.00. Both of the forms W-2 were issued to petitioner at his Florida address (3800 South Ocean Drive, Apt. 1816, Hollywood, Florida 33019). For the year 1987, the form W-2 indicated that State and City income taxes were withheld; no State or City income tax was withheld in 1988.

7. On July 1, 1993, the Division's auditor, Peter Otvos (Tax Auditor I), wrote a letter to PPRB requesting, among other things, a description of petitioner's job duties and the locations where he performed his services for the company. By letter dated July 6, 1993, PPRB's president, Thomas Turner, Jr., indicated that petitioner was the chairman and chief executive officer of PPRB, that "he worked out of this [1515 Broadway, New York, New York] office" and that he retired in April 1988.

On April 17, 1995, John Gilbert Smith, then president of PPRB, wrote a letter to petitioners' representative, Melvin M. Bark, CPA, in response to Mr. Bark's letter requesting clarification regarding payments made to petitioner in 1987 and 1988. Mr. Smith stated that he had no personal knowledge as to PPRB's arrangements with petitioner, since the month of petitioner's retirement coincided with his being hired. Mr. Smith indicated that he had spoken to Mr. Turner who was then PPRB's president and that Mr. Turner advised that the "retirement plan" was made between petitioner and Allied Graphic Arts (at that time, PPRB reported to Bob Wyker, president of Allied Graphic Arts). Mr. Wyker was unable to find any information on file but stated to Mr. Smith that he was of the impression that petitioner provided consulting services to PPRB from his Florida residence. Mr. Smith's letter further stated that an examination into PPRB's accounting department files offered no correspondence applicable to payments for the consulting services provided.

8. The affidavit of petitioner Sadie Roemer, sworn to on December 7, 1997, states that in 1987, petitioner Sidney Roemer was the chairman and chief executive officer of PPRB in New York City. Mr. Roemer planned to retire at the end of 1987 at the age of 80. Therefore, they

moved to Florida, became Florida residents and registered to vote there in 1987.<sup>2</sup> Mrs. Roemer's affidavit also stated:

In order to insure a proper transition for his successor at his company, they offered him a consulting position for one year, with the knowledge that he couldn't provide the services from New York, due to our moving to Florida. They agreed that he would provide consulting and research services from Florida. My husband did not wish to travel to or live in New York any longer. He had worked hard all of his life and was planning on enjoying his last years together with me at our new Florida residence.

Since the company had no choice and needed Sidney's services (since it was solely for their benefit), they agreed to a one year consulting contract for his services to be performed in Florida. Also, as we were trying to rent our New York Co-op Apartment, we were told that we did not have to file any tax returns in New York until we had a tenant and received rental income. We had no New York income for 1988; therefore no New York tax return was filed for that period.

9. At the hearing, petitioners' representative, Melvin M. Bark, CPA, testified based upon statements made to him by his clients.<sup>3</sup> Mr. Bark stated, in part, as follows:

And, my belief is that the corporation then allowed him, said to him, yes, you can work out of Florida, it doesn't bother us. We want you to consult with us. We know you are not going to be here in New York. You are 80 years old and you are certainly not going to commute between New York and Florida. That is because the employee would not have provided services to the employer had he been required to be in New York at that time (Transcript, p. 27).

Mr. Bark further stated that, based upon his discussions with members of the family, it is clear that petitioner worked only from his Florida home in 1988 and spent no working days in New York.

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<sup>2</sup>The answer of the Division admits that petitioner was a nonresident of New York City during 1988 and that he changed his place of domicile from New York City to Florida in 1987 at a time when he was employed by PPRB.

<sup>3</sup>Mr. Bark was the appointed representative of both the Estate of Sidney Roemer and petitioner Sadie Roemer. At the hearing, no witnesses appeared and testified.

10. The answer of the Division affirmatively states that during the year at issue, petitioner performed services for his New York City employer at locations both within and without the State and City of New York.

***SUMMARY OF THE PARTIES' POSITIONS***

11. Petitioners contend as follows:

a. Since petitioner Sadie Roemer had no New York source income for 1988 and since she was not obligated to and did not file a New York return for the year, the Division improperly issued the Notice of Deficiency to her. Accordingly, the Notice of Deficiency should be canceled as to this petitioner;

b. Petitioner, a nonresident of New York for 1988, performed no services in the State during the year (all of the services were performed in Florida). While letters from PPRB seem to indicate that petitioner may have worked in New York during part of 1988, these letters were written in response to inquiries from the Division five to seven years after the year at issue. Moreover, the words, "worked out of this office" mean that petitioner was a consultant to the New York office, not that he physically worked there. Latitude should be given to petitioners due to the death of Sidney Roemer before the audit began. Since the business was not carried on partly within and partly without the State, Tax Law § 613 is not applicable;

c. If it is determined that petitioner performed some services in New York during 1988 (it is alleged by the Division that petitioner performed services both within and without New York in 1988 and that he retired in April 1988), then, upon a showing that the services rendered outside of New York were for the necessity of the employer, an allocation of three-quarters of the income must be non-New York source income; and

d. All of the delays in resolving this matter were due to the Division and its employees. Accordingly, interest imposed on the deficiencies should be abated.

12. The position of the Division is as follows:

a. Because petitioners filed a joint Federal return for 1988, they were required to file a joint New York State and City return for that year. Accordingly, it was proper for the deficiency to be asserted against both Sidney and Sadie Roemer.

b. The letters from PPRB indicate that petitioner worked in New York City during a portion of 1988, thus making the provisions of Tax Law § 613(c) applicable. 20 NYCRR 131.18(a) provides that any allowance for days worked outside New York must have been rendered due to the necessity of the employer and not for the convenience of the employee. The Division maintains that there has been no showing that the services performed by petitioner could not have been performed in New York. Therefore, the wages earned by petitioner in 1988 were New York source income subject to State and City income taxes.

### ***CONCLUSIONS OF LAW***

A. Initially, it is contended that the Notice of Deficiency should be canceled as to petitioner Sadie Roemer since she had no New York source income for the year 1988 and, therefore, had no obligation to and did not, in fact, file a New York return for the year.

Tax Law § 651(b)(2) provides that if the Federal income tax liabilities of a husband and wife are determined on a joint Federal return, they are required to file a joint New York State income tax return and their tax liabilities will be joint and several. However, with respect to a nonresident spouse of a nonresident taxpayer, the Appellate Division, Third Department, in ***Brady v. State of New York*** (172 AD2d 17, 576 NYS2d 896, 899, ***appeal dismissed*** 79 NY2d 915, 581

NYS2d 667, *affid* 80 NY2d 596, 592 NYS2d 955, *cert denied* 509 US 905, 125 L Ed 2d 692), held Tax Law § 651(b)(2) unconstitutional, stating as follows:

Out-of state cohabitation with a spouse having New York income and filing a joint Federal income tax return with that spouse cannot constitute the necessary minimum connection for the extraterritorial exercise of New York's taxing power. Thus, we have concluded that Tax Law § 651(b)(2) violates due process insofar as it may be applied to require a nonresident spouse of a nonresident taxpayer to file a joint State tax return solely by reason of the marital relationship and the filing by the couple of a joint Federal income tax return.

Accordingly, since there is no evidence in this record that petitioner Sadie Roemer had any New York source income for the 1988 tax year, the Notice of Deficiency issued by the Division on November 24, 1995 (*see*, Finding of Fact "2") must be canceled as to petitioner Sadie Roemer.

B. Despite petitioners' contention that some latitude should be given because of the death of Sidney Roemer prior to the commencement of the audit, the burden of proof is, nevertheless, on petitioners to prove that Sidney Roemer performed no work in New York during the year at issue. In an attempt to satisfy that burden of proof, letters from Mr. Roemer's employer (PPRB) were submitted (*see*, Finding of Fact "7"). Unfortunately for petitioners, the 1993 letter from PPRB's president, Thomas Turner, Jr., indicated that Mr. Roemer worked out of the New York office and that he retired in April 1988. The 1995 letter from the subsequent president of PPRB, John Gilbert Smith, while stating that he had been informed that petitioner had provided consulting services to PPRB from his Florida residence, revealed that no correspondence applicable to payments for the consulting services could be located in PPRB's accounting department files. Moreover, petitioners have been unable to produce any written evidence of a consulting agreement.

As a result, it must be found that petitioners have failed to sustain their burden of proof, imposed pursuant to Tax Law § 689(e), to show that, for the year 1988, petitioner did not engage



in a business, trade, profession or occupation which was carried on partly within and partly without the State and City of New York. Accordingly, the provisions of Tax Law § 631 are applicable.

C. Tax Law § 631(a) provides that the New York source income of a nonresident individual (such as petitioner Sidney Roemer) includes the net amount of items of income, gain, loss and deduction reported in Federal adjusted gross income that are “derived from or connected with New York sources.” Included among these items are those attributable to a business, trade, profession or occupation carried on in this State (Tax Law § 631[b][1]).

D. Tax Law § 631(c) provides, in part, that;

[i]f a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the [commissioner of taxation], the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations.

Included among these regulations was 20 NYCRR former 131.18(a), in effect for the year at issue, which provided that “any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer.”

E. It is well settled that an employee’s out-of-state services are not performed for an employer’s necessity where the services could have been performed at his employer’s office (*Matter of Burke v. Bragalini*, 10 AD2d 654, 196 NYS2d 391). In addition, where there was no evidence that services performed at the employee’s out-of-state home could not have been undertaken at the employer’s office in New York, the services were performed out of state for the employee’s convenience, not the employer’s necessity (*Page v. State Tax Commission*, 46 AD2d 341, 362 NYS2d 599; *Matter of Simms v. Procaccino*, 47 AD2d 149, 365 NYS2d 73).

In the present matter, it is the apparent position of petitioners that PPRB needed the consulting services of Sidney Roemer, but that Mr. Roemer was not agreeable to performing these services unless he could perform them from his home in Florida. While it is unclear as to the necessity of Mr. Roemer's services, even if it is to be assumed that such services were essential, the facts are not in dispute that it was Mr. Roemer, not the employer (PPRB), who insisted that they be provided from Florida. Undoubtedly, these consulting services could have been performed in PPRB's New York City offices. Therefore, it must be found that the services performed by petitioner Sidney Roemer were performed out of state (in Florida) for *his* convenience, not the employer's necessity. Pursuant to 20 NYCRR former 131.18(a), there can be no allowance granted for days worked outside of New York for the year 1988 and it must be determined that the Division properly deemed all of the wage income earned by petitioner from PPRB for 1988 to be New York source income, subject to both New York State and New York City personal income taxes.

F. As previously noted (*see*, Finding of Fact "3"), penalty which was originally imposed upon the asserted deficiency was canceled by a Conciliation Order (CMS NO. 153386). Petitioners maintain, however, that interest should also be abated since there were significant delays on the part of the Division which resulted in the accrual of interest.

It must be noted that, for the year at issue, petitioners did not file a New York return. As a result thereof, the Division could assess tax at any time (Tax Law § 683[c][1][A]). In order to prevent the accrual of additional interest, petitioners had the option to pay the tax, plus interest, and thereupon file a claim for refund. Petitioners chose not to avail themselves of this option. Moreover, there is no evidence in this record to indicate that the conduct of the Division or its

employees resulted in any undue delay in this matter. Accordingly, petitioners' request to have interest abated must be denied.

G. The petition of the Estate of Sidney Roemer and Sadie Roemer is granted to the extent indicated in Conclusions of Law "A" and "F"; the Division of Taxation is hereby directed to modify the Notice of Deficiency issued to petitioners on November 24, 1995 accordingly; and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York  
September 3, 1998

/s/ Brian F. Friedman  
ADMINISTRATIVE LAW JUDGE